

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION

4 -----)
5 IN RE: NATIONAL) MDL No. 2804
6 PRESCRIPTION OPIATE)
7 LITIGATION) Case No.
8 -----) 1:17-MD-2804
9)
10 THIS DOCUMENT RELATES TO) Hon. Dan A. Polster
11 ALL CASES)
12 -----)

13 HIGHLY CONFIDENTIAL
14 SUBJECT TO FURTHER CONFIDENTIALITY REVIEW

15 VIDEOTAPED DEPOSITION OF
16 JOHN MERRITELLO
17 January 18, 2019
18 Chicago, Illinois

19
20
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8 BY THE WITNESS:

9 A. I think you lost me a little bit --

10 BY MR. SHKOLNIK:

11 Q. I'll rephrase it.

12 A. -- with a group coming from West
13 Virginia into some other state with a handful of
14 prescriptions.

15 Q. And a lot of cash.

16 A. And a lot of cash and it's the same guy
17 that's going to go around to a bunch of pharmacies.
18 He's committing a crime now, isn't he?

19 Q. It's possible. But the fact --

20 A. Terrible.

21 Q. But the fact of the matter is if you
22 have people willing to pay cash, I don't care if
23 it's Howard Hughes or John Smith from Main Street,
24 if you have a group of people willing to pay cash

1 and the store has two separate ceilings, one for
2 generic OxyContin and one for brand OxyContin, that
3 would be a way for the store to sell upwards of
4 double of the OxyContin without triggering
5 ceilings --

6 MR. BENSINGER: Objection; foundation.

7 BY MR. SHKOLNIK:

8 Q. -- if you don't combine them?

9 MR. BENSINGER: Objection; foundation,
10 improper hypothetical.

11 BY THE WITNESS:

12 A. I'm going to have to argue with you
13 because across the universe, the brand line would
14 be very, very low and even a prescription or two
15 could put a store over its ceiling in a minute.

16 That number is going -- you're going to
17 be crawling -- that number is going to be crawling
18 along the bottom here without --

19 MR. SHKOLNIK: Can you put that back up on the
20 screen, please.

21 BY THE WITNESS:

22 A. Oh.

23 BY MR. SHKOLNIK:

24 Q. No, it's fine. I didn't realize it was

1 shut down.

2 I gather what you're saying --

3 MR. BENSINGER: Excuse me. Mr. Merritello,
4 had you finished your answer?

5 MR. SHKOLNIK: Oh, I'm sorry.

6 MR. BENSINGER: Could you read back the answer
7 and you let us know if you had finished or you were
8 interrupted.

9 MR. SHKOLNIK: I don't mean to cut you off.

10 (WHEREUPON, the record was read
11 by the reporter as requested.)

12 BY THE WITNESS:

13 A. Let me rephrase just a little bit of
14 what I said.

15 BY MR. SHKOLNIK:

16 Q. Sure.

17 A. The regression line would be very, very,
18 very, very low. That number would be a very small
19 number. And if you filled a prescription of 30 or
20 60 and you did it twice, you're going to be sizably
21 out of range for that branded item and it's going
22 to be reported back.

23 Q. Okay.

24 A. Okay? And the other, the generic line,

1 I would anticipate that under normal circumstances
2 in a normal store would be much higher than that
3 branded item. So, the idea that you could double
4 there, I don't agree with that. I don't believe
5 you could do that.

6 Q. If I take out double, you could still
7 have increased sales by not combining the two
8 ceilings?

9 MR. BENSINGER: Objection; foundation,
10 improper hypothetical.

11 BY THE WITNESS:

12 A. A very slight one.

13 BY MR. SHKOLNIK:

14 Q. And do you know what was happening in
15 Florida during the 2010 to 2012 time frame in terms
16 of the numbers of pills that were being dispensed
17 at the Walgreens pharmacies? When I say pills, the
18 C-IIs, the controlled substances.

19 A. No, no, I can't recall that.

20 Q. If we can go to the next page, which is
21 619 of the PowerPoint. Here there's a description
22 and it says -- we know this PowerPoint is in
23 January of 2013. The PowerPoint is now saying,
24 "SOM version 5.5 is an industry leading enhancement

1 to SIMS."

2 Do you recall what 5.5 was?

3 A. Not -- not off the top of my head. I'm
4 sorry.

5 Q. But by this point in time, your team had
6 already developed the ceiling algorithm, by 2013,
7 correct?

8 A. I'll guess that 5.5 is referring to the
9 ceiling tool, the whole thing, including the
10 dashboard for the integrity group and all of the
11 workings on the store AS400.

12 Q. And here it says, "Program enhancement
13 to SIMS to impact ordering processes of all
14 controlled substances and PSE.

15 "Part of the calculations use an
16 accumulation of receipts of each controlled
17 substance over the last six weeks time."

18 Was part of the analysis, I guess it's
19 the regression model that's being utilized, did it
20 contemplate a six-week lookback or were you
21 contemplating some other -- did you consider other
22 lookback periods in developing the algorithm?

23 A. So, when I went to the meeting and then
24 there was subsequent meetings and an iteration with

1 programmers and design, that six-week is
2 configurable.

3 Six weeks was what I thought they ought
4 to start at, and I believe they are still using six
5 weeks today because that's recent enough history
6 and it actually is a complete six weeks. Today a
7 receipt comes in and six weeks go and a day, that
8 one comes out of that total that the store has
9 received in six weeks.

10 That's the -- that's the amount that
11 you're looking at. You're looking at a six-week
12 amount of receipts at that store pitted against the
13 whole chain.

14 Q. And so when you say six weeks receipts,
15 are we talking receipts buying from the
16 distribution center or receipts related to sales or
17 both?

18 MR. BENSINGER: Objection.

19 BY THE WITNESS:

20 A. Receipts and sales, in my terminology,
21 we have to keep separate.

22 A receipt is an inbound from a vendor or
23 from a distribution center or from another store,
24 which is a no-no I think, but at points in time in

1 the past they had done that.

2 BY MR. SHKOLNIK:

3 Q. Understand.

4 A. Or they had buyouts from where we would
5 take over a pharmacy and we would induct a receipt
6 into the system.

7 All of those are considered receipts of
8 product as it's coming in the door.

9 Q. Okay. I'm glad you clarified.

10 A. Not sold. Not sold, though. That's
11 different.

12 Q. I just didn't want anyone to be looking
13 at this thinking when I think of a receipt, I'm
14 like I go buy something, they give me a piece of
15 paper, that's a receipt. We're talking a different
16 receipt in the sense of ceiling application?

17 A. Correct. And we could even use the
18 word, instead of receipts, which seems to be
19 confusing, we could just say received quantity and
20 we would be more proper.

21 Q. So, what -- the ceiling calculation that
22 you had suggested and which actually was adopted
23 into the ceiling program was a lookback of six
24 weeks of what was received by the specific

1 pharmacy, it's calculated, and it's compared to
2 similar pharmacies across the chain in terms of
3 their receipts, their average receipts, for that
4 molecule?

5 MR. BENSINGER: Objection;
6 mischaracterization. You can answer.

7 BY THE WITNESS:

8 A. I think you're close to the idea.

9 BY MR. SHKOLNIK:

10 Q. I'm trying.

11 A. It's drawing what a normal store should
12 be receiving in a six-week period of time and then
13 pits that against what's actually happening at that
14 given location. And if it's too far away from the
15 norm, it becomes that 75% or it becomes over the
16 ceiling, if you would.

17 Q. But when you're saying, and using your
18 phraseology, the normal store, the normal store
19 would be a store similar to the one we're
20 analyzing, not just store in Little Town in Iowa
21 and store in Manhattan that may have vastly
22 different receipts of -- received -- receivables of
23 the opioids. You're using similar class stores,
24 are you not?

1 MR. BENSINGER: Objection; vague.

2 BY THE WITNESS:

3 A. No. When I -- when I say norm, normal,
4 I'm lumping them by volume group. So, for a store
5 that does 400 prescriptions, 405 would be
6 different. 500, you would come out with a
7 different number from the regression line as it
8 moved up the line or down the line. Not geography.
9 I think that's what you were getting at.

10 BY MR. SHKOLNIK:

11 Q. No. I was just talking about -- I
12 should have clarified it.

13 So, you're looking at stores by volume.
14 It could be a store in Little Town in Florida that
15 may take receipt of a million pills. You compare
16 it to a store anywhere, could be a city or a town
17 somewhere else that gets a million pills. That
18 would be a -- that's the norm.

19 A. All gets baked into this equation.

20 Q. Then it says up on the PowerPoint,
21 "Tolerance and ceiling limits are applied to
22 individual orders at the store level."

23 So, now in the 5.5 version, what's being
24 done at Walgreens, and this is sometime in 2013,

1 there is two different models that are running that
2 would have to -- that an order would be run through
3 before it's distributed, correct?

4 MR. BENSINGER: Objection; mischaracterization.

5 BY MR. SHKOLNIK:

6 Q. I'll rephrase it.

7 A. Thanks.

8 Q. At this point in 2013 when 5.5 is
9 initiated, when an order is placed, before it's
10 received in the store, there is going to be two
11 analyses applied to the order. One is the
12 tolerance and one is the ceiling limit. Am I
13 correct?

14 MR. BENSINGER: Same objection. You can
15 answer.

16 BY THE WITNESS:

17 A. Before the order is placed, before it
18 becomes an order, and if it's a suggested order,
19 which means it's generated by the system, it will
20 take into account the ceiling value and then if
21 the -- and I'm going to use the term "user," but
22 let's say it's the pharmacist or whoever in the
23 pharmacy, operator, alters the suggested quantity
24 or has created a manual order, that would be

1 subject then to the tolerance and, again, before it
2 transmits to the ceiling.

3 Does that make sense?

4 BY MR. SHKOLNIK:

5 Q. Yes, yes.

6 A. Okay.

7 Q. So, now as a result of the 5.5, the
8 distribution center never gets an order if it
9 exceeds either tolerance or ceiling or both,
10 irrespective if it's a computer-generated one or a
11 manual one?

12 A. If an order is -- will not be generated,
13 an automated order, if it's generated, will not
14 exceed the ceiling limit and if the user enters a
15 quantity which pushes the -- that above the
16 ceiling, they get zero.

17 If there was an order for, say, two
18 bottles and that was below the ceiling but the user
19 went and put in three, they get zero. Never goes
20 out.

21 Q. That became in effect in 2013?

22 A. With this.

23 Q. 5.5?

24 MR. BENSINGER: Objection; misstatement.

1 MR. SHKOLNIK: I'll rephrase it.

2 BY MR. SHKOLNIK:

3 Q. Did that go into effect as part of 5.5,
4 whatever date 5.5 became effective?

5 MR. BENSINGER: Objection; foundation.

6 BY THE WITNESS:

7 A. That's how the ceiling works. If the
8 store forces a quantity -- when I say "force." If
9 a store manipulates a suggested quantity or enters
10 a quantity that's above the ceiling, no order is
11 placed. Zero. Whether there was one already there
12 for some number of packages and the additional
13 packages the store is requesting brings it over,
14 they get zero.

15 BY MR. SHKOLNIK:

16 Q. Wasn't there a period of time where the
17 computer would reduce it to either the ceiling or
18 the tolerance level or both and let the order
19 proceed?

20 A. Ceiling does not work that way. I'm not
21 the expert on tolerance, but I believe tolerance
22 would have -- there was a time when the tolerance
23 would actually adjust the order and then send it.

24 Q. So, when you put in the ceiling

1 criteria, that stopped that process from happening?

2 A. Yes, sir.

3 MR. BENSINGER: Objection; vague.

4 BY MR. SHKOLNIK:

5 Q. Would I be correct in stating that
6 around the time when you released 5.5 there was a
7 discussion amongst the people working on this
8 ceiling task that the company was concerned that
9 its use of a reduction factor to allow an order to
10 go forward was somehow violative of the DEA's
11 recommendations?

12 MR. BENSINGER: Objection; foundation.

13 And, Mr. Merritello, I admonish you not
14 to reveal the substance of attorney-client
15 communications to the extent the answer calls for
16 it and to confer with me as counsel to the extent
17 you have any question or concern as to whether in
18 answering the question you might reveal a
19 privileged attorney-client communication.

20 Otherwise you may answer if you have the
21 question in mind.

22 BY MR. SHKOLNIK:

23 Q. Do you want me to ask it again? I could
24 read it back.

1 A. Yes.

2 MR. BENSINGER: Could you read it back.

3 Could you read it back.

4 MR. SHKOLNIK: I'm sorry. I was going to
5 reask the question, but read it back is fine.

6 (WHEREUPON, the record was read
7 by the reporter as requested.)

8 BY THE WITNESS:

9 A. Was there a concern? I -- I can't
10 recall. I'm trying to put my arms around what that
11 means.

12 BY MR. SHKOLNIK:

13 Q. Okay. Let me -- were there any
14 discussions among the group that were working on
15 the ceiling project that went along the lines of we
16 have been reducing orders that exceeded tolerance
17 and the DEA has indicated that that's not an
18 appropriate way to handle an over-tolerance order
19 and that now with respect to ceilings, we're going
20 to stop that?

21 MR. BENSINGER: Again, Mr. Merritello, we
22 should confer before you answer if to any extent
23 your answer is eliciting an attorney-client
24 communication.

1 BY THE WITNESS:

2 A. I guess I don't understand, I'm sorry,
3 the question. I don't know.

4 BY MR. SHKOLNIK:

5 Q. If you don't understand, I have to retry
6 it until I get for you to understand.

7 Did you become aware at any point in
8 time, and I don't mean with conversations with
9 counsel in prep for a deposition, did you,
10 Mr. Merritello, back when you were working on the
11 project, the ceiling project, did you become aware
12 that the DEA had indicated to Walgreens and other
13 pharmacy distributors that the reduction of a
14 potentially suspicious order to a lower amount to
15 avoid hitting ceiling, that that was an
16 inappropriate practice?

17 MR. BENSINGER: So, Mr. Merritello, my
18 admonition is not limited to attorney-client
19 communications in preparing for your deposition
20 today.

21 If at the time in order to answer the
22 pending question you have some doubt in your mind
23 as to whether in answering you'd be revealing an
24 attorney-client communication that took place back

1 at the time, I need to confer with you before you
2 answer and we'll go off the record. Otherwise you
3 can go ahead and answer.

4 BY THE WITNESS:

5 A. I guess -- I'm trying to figure. I
6 can't even guess at what you're -- at what I'm
7 being asked. There is -- your --

8 BY MR. SHKOLNIK:

9 Q. I don't want you to guess.

10 A. Okay.

11 Q. I'll rephrase. It's easier.

12 You were aware that prior to the ceiling
13 being implemented under 5.5, one of the practices
14 at Walgreens was if an order was placed, whether it
15 was an electronic or by a pharmacist manually, if
16 the order would have exceeded the tolerance, there
17 was an automatic reduction of the order to a level
18 that was below the tolerance and allow the order to
19 go through? You were aware of that, correct?

20 MR. BENSINGER: Objection; foundation.

21 BY THE WITNESS:

22 A. Yeah, I'm aware of how tolerance works,
23 and there was a period of time when they had the
24 tolerance program without the ceiling program, that

1 there was an adjustment made to that.

2 BY MR. SHKOLNIK:

3 Q. Did you become aware when you got on to
4 the team working on ceiling that Walgreens had been
5 advised by DEA that the practice of making the
6 adjustment, the reduction down, was an
7 inappropriate practice?

8 MR. BENSINGER: Objection; vague.

9 BY MR. SHKOLNIK:

10 Q. From the DEA's perspective.

11 MR. BENSINGER: Objection; vague.

12 BY THE WITNESS:

13 A. Again, the ceiling doesn't allow the
14 order to go.

15 BY MR. SHKOLNIK:

16 Q. I understand.

17 A. It vaporizes. It's just non- -- it's
18 non-existent.

19 Q. But I'm talking about before you
20 implemented the ceiling. Did you become aware that
21 the DEA had suggested to Walgreen, DEA
22 representatives had suggested to Walgreens, the
23 practice of adjusting down as was being done with
24 the tolerance program was an inappropriate

1 practice?

2 A. You're asking me that at the time that
3 we were putting together this program was I aware
4 of that?

5 Q. Yes.

6 A. I'm going to have to tell you I don't
7 recall. I may have heard discussion, but...

8 Q. Okay. Would it be fair to say it was
9 not one of the program requirements that you were
10 charged with, that we have got to get rid of the
11 adjustment down component when we implement
12 ceiling?

13 A. Ceiling doesn't work that way. We
14 just -- this is it and no more.

15 Q. I understand.

16 A. And that was a -- that was also not a
17 very popular answer to the group. They didn't like
18 the idea that, well, what if we need to get it?
19 No. You got to go to the integrity team now.

20 Q. If someone had -- I'll withdraw the
21 question.

22 MR. SHKOLNIK: Let's take our break now. We
23 have been going at this a while. Thank you so
24 much.

1 THE VIDEOGRAPHER: We are off the record at
2 10:26 a.m.

3 (WHEREUPON, a recess was had
4 from 10:26 to 10:37 a.m.)

5 THE VIDEOGRAPHER: We are back on the record
6 at 10:37 a.m.

7 (WHEREUPON, a certain document was
8 marked Walgreens-Merritello Exhibit
9 No. 2: Excerpts of Personnel File,
10 John Merritello; not Bates
11 stamped.)

12 BY MR. SHKOLNIK:

13 Q. Mr. Merritello, I'm going to hand you
14 what we're marking as Exhibit 2. It's a copy of
15 excerpts of your personnel file. Really not going
16 to go into a lot of it. If you could --

17 MR. SHKOLNIK: And there's no Bates -- for the
18 people above, there is no Bates number on this
19 because it was just produced. It hasn't been
20 processed. But it is the personnel file.

21 BY MR. SHKOLNIK:

22 Q. If you could turn to page -- in the
23 first section on the bottom it says page 6 of 18,
24 because there is two segments where you'll have

1 those numberings. Maybe not. Yeah. The first
2 section is where I'm going. 6 of 18.

3 And from looking at this document, which
4 is highly redacted, at the bottom of the page, it
5 says "Annual Performance Review (Fiscal Year 13) -
6 Corporate, John Merritello, Jr."

7 Have you had an opportunity to see this
8 document before?

9 A. It looks a little familiar.

10 Q. As part of the yearly reviews, is it
11 common at Walgreens that you would put in your
12 assessment of what you think you accomplished and
13 then your immediate supervisor here, Denman Murray,
14 would put in his evaluation and that's what your
15 yearly review would include?

16 A. Yes.

17 Q. In -- on this page, page 8 (sic) of 18,
18 one section is "SOM/Tool Kit" up on the top. And
19 then it says, "v5 implemented Q2, v6 and 7
20 implemented Q4."

21 Just so we're talking the same language,
22 when they say "v5 implemented Q2," what does that
23 mean?

24 A. I'm guessing that that means version 5.

1 Q. Of the SOM?

2 A. Of the SOM.

3 Q. And that's what we were just talking
4 about, the ceiling component? Am I correct?

5 A. Yep.

6 Q. And then "version 6/7 implemented Q4,"
7 we can go into later what 6 and 7 were, but that
8 just means based upon your -- what you're writing
9 here in your personnel file that both 5, 6 -- I'm
10 sorry. Not both. 5, 6 and 7 were all implemented
11 fiscal year 2013 which began on September 1, 2012
12 and ended August 3, 2013?

13 A. I believe that's correct.

14 Q. And when it says Q2, that would mean v5
15 was implemented sometime in the winter of 2013,
16 correct?

17 A. That makes sense.

18 Q. The first quarter being September to
19 December. Quarter 2, January to, say, March or so,
20 correct?

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